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No. 1023 (October Term, 1940).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITION OF A. J. PICKETT FOR A REHEARING.

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Comes now A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, duly authorized representative of James Foster and others, and respectfully moves this Court to set aside its opinion and judgment in the above-entitled cause, herein rendered on March 2, 1942, and to grant petitioner a rehearing of this cause, and for grounds of this motion respectfully states that questions decisive of this cause have been overlooked by this Court, and that this Court has erred in affirming the judgment of the Circuit Court of Appeals, as petitioner respectfully submits, in the following respects:

I.

On page 8 of its opinion the Court holds that irrespective of the protest of the red caps against the accounting and guarantee plan, by continuing to work a new contract was created, that is, that the accounting and guarantee plan became a part of the red caps' employment contract. Petitioner respectfully submits that the Court erred in so holding because if employees of railroads subject to the Railway Labor Act must quit their jobs whenever there is a dispute between them and their employer as to a change in their working conditions under penalty of being held to have accepted the employer's terms by remaining in its employ, then the very purpose of the enactment of the Railway Labor Act will be thwarted. As the Court observed on page 9 of its opinion, the object of the act is to avoid interruption to commerce by providing means of settling disputes between railroad carriers and their employees. This purpose can only be effectuated by holding that where there is a dispute between a railroad subject to the act and its employees as to working conditions, the employees shall not be considered to have accepted and agreed to the employer's viewpoint simply because they have continued on the job as the Railway Labor Act contemplates they should do.

The opinion of the Court appears to be based on the general rule that an employee by continuing to work after an employer announces a change of working conditions is conclusively held to have accepted the new conditions regardless of his protestations against the changes, but the Court has overlooked the essential distinction between the ordinary case where the Railway Labor Act has no application, and a case where the act controls the relations between the employer and his employees.

The trial court held in its findings of fact (R. 280) that there was never any meeting of the minds of respondent

and the red caps on the terms of respondent's notice of October 22, 1938, and held that respondent by its conduct thereafter had recognized that the question of whether tips could be considered wages was an open one between the parties (R. 277, 287). We do not understand this Court to hold otherwise so far as any actual consent of the red caps is concerned. The Court apparently bases its decision on the fact that the red caps continued to work after their protest against the new arrangement, and that by so doing they must be held to have accepted the new terms, although, as a matter of fact, they did not do so. The Court's opinion is based on the cases cited by respondent, in none of which was the Railway Labor Act applicable to the parties. We respectfully submit that the Court erred in holding that by the red caps continuing to work a new contract was created, although the trial court found as a fact that there had never been any new contract made between the red caps and respondent (R. 280).

II.

The majority opinion of the Court in holding that the terminal company could lawfully take credit for the red caps' tips against the minimum wage has in effect held that a common carrier not only can become the recipient of tips given by its patrons to its employees, but also can become such recipient surreptitiously by leading its patrons to believe they are tipping the employees, while in fact they are tipping the company. The minority opinion points out the element of deception inherent in such practice. Petitioner respectfully submits that this Court should not put the stamp of approval on deceit of this kind. The dissenting opinion in the case of Ex Parte Farb, 174 Pac. 320, decided by the California Supreme Court, in speaking of a contract whereby an employee agrees to turn over his tips to the employer says:

"The contract * * * is one which is in its essence unconscionable and fraudulent, and is also one which in many, if not most, instances is devoid of that very element of freedom as to one of the parties by which it is sought to be justified. * * * **It is fraudulent in respect to those patrons because it secretly aims to take from them that which they intended for another,** and because its effect is to destroy the very incentive for doing those things for which the gratuity was given * * *." (Emphasis ours.)

In note 29 on page 15 of its opinion the Court says that the plan of the red caps turning in their tips to the company is substantially the same as the tag system inaugurated at the Jacksonville Terminal after the termination of the accounting and guarantee system. Petitioner submits that there is an essential difference in the two systems, especially in view of the fact that the terminal companies are common carriers, in that in the former case the public gives tips to the red caps thinking it is giving them to the red caps, while, as a matter of fact, it is tipping the company, whereas in the latter case the public knows that it is paying the company for the services rendered. The cases cited by the Court in note 10 on page 8 of its opinion on the general question of the validity of a contract to turn over tips, except the Harrison case, an opinion of the District Court of the Western District of Missouri in another red cap case, are distinguishable as none of them involves common carriers. No court has held heretofore that a common carrier may receive tips from the public. Petitioner respectfully submits that this high court should not be the first court to do so, and that this Court should not say to the carriers:

"You cannot openly solicit or receive tips from the public since you are a common carrier, but if you are careful to conceal what you are doing, and not let the public know that you are getting the benefit of tips

it gives to red caps it is entirely legal, reprehensible as it may appear to the ordinary layman, for you to permit the red caps to wheedle tips out of the public, and then claim for yourself the benefit of these tips."

Petitioner respectfully submits that this Court in approving the accounting and guarantee plan is taking a narrow and legalistic view of the case, and that it should not follow the precedents in cases not involving carriers holding that an employer may require an employee to turn over his tips, but should look rather to the intent of the public in giving tips, and say to the carrier that it may not take that which is intended for another, and that if it wants to claim tips, it should let the public know that it is doing so, so that the public may decide whether it will continue to tip the carrier.

III.

On page 16 of its opinion the Court says that there is nothing in the Interstate Commerce Act indicating that the red caps would have a right of action under that act by reason of the carriers taking credit for the tips received by the red caps. Petitioner respectfully submits that the Court has misconceived his position. Petitioner has never claimed and does not now claim that he has any right of action under the Interstate Commerce Act. This suit is not bottomed on the Interstate Commerce Act, but on the Fair Labor Standards Act. Our contention has been, and is, that a common carrier can only receive compensation for services rendered by it by making a charge for the services. It is true the Interstate Commerce Commission in the case of Brownlee v. Southern Railway Company, 192 I. C. C. 119, 121, cited on page 16 of the Court's opinion, held that a carrier may lawfully retain moneys received by it as a charge for transportation service even though no tariff has been filed, to the extent the charge is

just and reasonable. This case is not in point, however, because in the case at bar the terminal company made no charge whatsoever for red-cap service. We do not contend that the respondent could not have lawfully retained moneys received by it as charges for red-cap service simply because a tariff was not filed, nor because the charges were not uniform, but we do say that in order to acquire title to any money received from passengers, it must have been received as a charge for service, openly made and openly paid as a charge, and not covertly received in the form of tips. As a matter of fact, respondent in this case never pretended to make a charge for red-cap service. In the Brownlee case the carrier had actually in its possession money which it had exacted as a charge, and the Interstate Commerce Commission held that even though the charge was made without tariff authority, the shipper could recover only so much thereof as was unreasonable, whereas in the case at bar, respondent has received no money as a charge, but is attempting to claim as its own tips which were never intended for it. Petitioner respectfully submits that this Court erred in holding that it might lawfully do so.

Respectfully submitted,

CHAS. M. HAY,
S. D. FLANAGAN and
E. D. FRANEY,
Attorneys for Petitioner.

Certificate of Counsel.

Charles M. Hay, S. D. Flanagan and E. D. Franey, attorneys for the petitioner in the above-entitled cause, do hereby certify that the above and foregoing petition for a rehearing is presented in good faith and not for delay, and is believed by them to be meritorious.

Charles M. Hay,
S. D. Flanagan and
E. D. Franey,
Attorneys for Petitioner..